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THE IMPACT OF LIFTING THE NEWSPAPER-TV CROSS-OWNERSHIP BAN ON LOS ANGELES MEDIA MARKETS

Statement of

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On behalf of

Consumer Federation of America,
Consumers Union,
Free Press,
And
The Media and Democracy Coalition

Before the

Federal Communications Commission,
Public Hearing On Media Ownership
Los Angeles, California

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Mr. Chairman and Commissioners,

My name is Dr. Mark Cooper. I am the Director of Research at the Consumer Federation of America and a Fellow at the McGannon Communications Research Center at Fordham University. I appear today on behalf of the Consumer Federation of America, Consumers Union, Free Press and the Media and Democracy Coalition. We appreciate the opportunity to appear before you today and present our views on the media market in Los Angeles. In my testimony today, I will address a series of questions that confronts the Federal Communications Commission (FCC) in this proceeding.

Why did the FCC go so far astray in its last effort to analyze the structure of media markets in America?

How should media markets be analyzed and what goals should be set to promote competition, localism and diversity?

What is the current state of the Los Angeles media market and what would be the impact of newspaper-TV mergers on that market?

Why is this so important to localism and diversity?

THE CRITIQUE OF THE FCC APPROACH TO MEASURING MARKET CONCENTRATION

INTRODUCTION: RULERS V. RULES

In discussing the FCC's approach taken to market structure analysis in 2003, Ken Ferree, head of the Media Bureau, would emphasize that people must not confuse the ruler with the rules. As an example, he recounted a story about his life-long desire to be a fighter pilot. The problem was, he grew to be 6 feet 6 inches. He got too tall to comfortably fit in a cockpit and the military had a height limit. The ruler was not the problem, the rule was.

Market structure analysis is a ruler, not a rule. Whatever rule that is proposed, can be assessed with the ruler. The *Prometheus* Court[1] found that the FCC had bungled both jobs, crafting the ruler (the Diversity Index) and writing the rule (cross-media limits).

The fact that the FCC did such a bad job does not mean it can simply quit. It still must find a way to measure diversity and competition in local media markets and write rules that promote the goal of "the widest dissemination of information from diverse and antagonistic sources." Three Courts have now told the FCC to carefully count voices.[2] Perhaps because it was the third try, the *Prometheus* Court gave a detailed road map.

The legal standard for reviewing rules is important because it establishes the quality of the analysis that must be conducted in support of a rule. At the most basic level, Congressional intent is important and a Court "may find an agency rule is arbitrary and capricious where the agency has relied on factors which Congress has not intended it to consider." This can be termed "an abuse of discretion, or otherwise not in accordance with the law."[3] The Court asks whether "the agency examined the relevant data and articulated a satisfactory explanation for its action, including a 'rational' connection between the facts found and the choice made." If not, it can be concluded that "the agency made a clear error in judgment."[4]

Although an expert agency like the FCC is given discretion in writing rules, at a more complex level the Courts will overturn rules if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decisions that runs counter to

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[1] *Prometheus Radio Project, et al. v. FCC* 373 (2004) (*Prometheus);*
[2] *Fox Television Stations, Inc., v. FCC*, 280 F.3d 1027 (D.C. Circ. 2002) (*Fox*); *Sinclair Broadcasting, Inc. v. FCC*, 284 F.3d 148 (D.C. Circ. 2002) (*Sinclair*).
[3] *Id.*, p. 31.
[4] *Id.*, p. 31.

the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[5] In the case of an exercise such as identifying thresholds for merger review under the Administrative Procedures Act (APA),

> the traditional APA standard of review is even more deferential "where the issues involve 'elusive' and 'not easily defined,' areas such as program diversity in broadcasting." Yet… a "rationality" standard is appropriate… when an agency has engaged in line-drawing determinations… its decisions may not be "patently unreasonable" or run counter to the evidence before the agency.[6]

Thus, legal practice does not demand (and social science cannot provide) perfection or even great precision in the analysis. It demands substantial evidence, consistent reasoning, choices that are reasonable and results that are rational.

Analytic And Methodological Flaws In The FCC's Ruler

In *Sinclair*, the D.C. Circuit Court had criticized the FCC's rule limiting the ownership of multiple TV stations within a single market (the duopoly rule) because it had counted media "voices" in the same market differently for each of its rules. The court wanted consistency between rules. In reviewing the rule that prevents the holder of a television station license from owning a newspaper in the same market in its biennial review, the FCC had to confront the task of treating different media consistently head on. It had to deal with the challenge of combining media in one analytical framework. Thus, the central issue in the cross-ownership proceeding – how to count different media within the same market – is what led the court to reject the rules in *Sinclair*.

The FCC responded by adopting a modification of a standard antitrust approach to create a consistent empirical framework for evaluating media outlets in a local area. Where

[5] *Id.*, p. 31.
[6] *Id.*, p. 32

different types of media had to be considered together – e.g. in the question of mergers between newspapers and television stations – the FCC attempted to create a single Diversity Index.

The Court accepted the general antitrust framework and even the idea that a single index could be created, but found the FCC's implementation to be faulty. "But for all of its efforts, the Commission's Cross-Media Limits employ several irrational assumptions and inconsistencies."[7] The Court identified three primary problems in the implementation of the Diversity Index.

The FCC refused to analyze the actual audience of a media outlet, assuming instead that all outlets within a media type are equal. Its weights for combining each type of media were inconsistent and not based on sound empirical measures. The link between the index and the merger approval was tenuous at best.

The Court found that the FCC had not properly weighted the various media. "In converting the HHI to a measure for diversity in local markets, however, the Commission gave too much weight to the Internet as a media outlet."[8] The Court focused on the handling of the Internet, in part, because of the extensive arguments presented by media owners to the Commission that the Internet had dramatically changed the media landscape. In fact, the mishandling of radio actually has a larger impact. However, viewing the issue through the portal of the Internet provided the Court with the opportunity to present a richly nuanced discussion of the media's output and function. By assigning a substantial weight to the

[7] *Id.*, p. 58.
[8] Prometheus, p. 58.

Internet, the FCC had failed to note that there was very little independent local news and information produced by many of the websites the FCC pointed to.[9]

The reach of the outlet is also important. The Court made this clear in the discussion of the way the FCC treated cable and the Internet. The Court said it chose to "affirm the Commission's reasoned decision to discount cable. But we think that the same rationale also applies to the Internet."[10] The FCC had excluded cable from the local news and information market, since it found that there was little local news available and few such channels reach the public. For example, the FCC found that for many who said they watched cable for news, "cable news channels were probably confused with broadcast network news."[11] Moreover, only 10 to 15% of cable systems include channels that provide local and public affairs programming."[12]

A close look at the data showed the *Prometheus* Court that the Internet exhibits characteristics that are similar to cable. For example, "62 percent of Internet users get local news from newspaper websites, 39% visit television web sites."[13] The FCC's claim that "the Internet is available everywhere," was challenged by the fact that "almost 30% of Americans do not have Internet access."[14] The Court concluded that "on remand the Commission must either exclude the Internet from the media selected for inclusion in the Diversity Index or provide a better explanation for why it is included in light of the exclusion of cable."[15]

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[9] Id., p. 58.
[10] *Id.*, p. 62.
[11] *Id.*, p. 63.
[12] *Id.*, p. 63.
[13] *Id.*, p. 65.
[14] *Id.*, p. 68.
[15] *Id.*, p. 68.

Distinguishing Between Local and National News and Information

In its effort to identify the most important sources of news, the FCC asked a question that combined both national and local news. "What single source do you use most often for local or national news and current affairs?" This, of course, destroys the possibility of using this question to specifically assess the importance of local media. Instead, the FCC fell back on a much weaker question about local sources of news. "What source, if any, have you used in the past 7 days for local news and current affairs?"[16] This question does not necessarily tell us anything about what people use or rely upon the most for local news and information in the broad sense. It belittles the importance of the local news question by not only shrinking the scope of consideration for respondents ("in the past 7 days"), but also by being itself dismissive of the question altogether ("What source, if any…").

Handling Multiple Responses

The FCC compounded the problem by mishandling the responses to its weak question. This was an open-ended question in which respondents were allowed multiple responses. Sources they mention first clearly came to their minds. One might infer that what they recall reflects the importance of the sources to them. Unfortunately, the FCC did not simply accept these responses. It followed up with a prompted question directed only at those who did not mention a specific source. The FCC asked those people who failed to mention a source whether they had used it. The FCC then combined the answers to the two questions, giving them equal weight. This approach was certain to overweight the less prevalent and important

[16] The FCC also asked the question in an unbalanced manner. That is, it directly asked all the respondents who mention a given media in response to the first question, whether they had gotten any news from each of the other sources. The fewer the respondents who gave a medium in response to the first question, the greater the number who were directly prompted about it on the second round. The FCC then gave equal weights to the first and second responses. This has the effect of artificially increasing the weight of the lesser sources (since more people are prompted) especially when the question is about weak exposure to a source.

sources by asking many more people about those sources a second time with a prompted question.

Part of the FCC's problem was caused by weak methodology. The FCC recognized the importance of evaluating the use of the media.[17] In order to address the issue, it commissioned a survey. Yet, the FCC failed to ask the right questions and proceeded to make rules with admittedly faulty data. "Unfortunately, we do not have data on this question specifically with regard to local news and current affairs. The available 'primary source' data address local and national news together and do not show that different media have different importance, in the sense that primary usage differs across media."[18]

This combination of flaws was disastrous for the Commission's rules. The words the Court used to describe the FCC's analysis are harsh to say the least – "inconsistent, unrealistic assumptions,"[19] "requires us to abandon both logic and reality."[20] The Court has outlined a clear path to a reasonable approach to analyzing media markets and implementing rules that fulfill the intent of Congress.

WRITING REASONABLE RULES THAT COMPLY WITH FIRST AMENDMENT PRINCIPLES

GOALS

We start from the goals of antitrust merger policy and media policy to answer these questions. Specifying goals is essential to evaluate the impact of any changes in policy.

[17] *FCC Ownership Rules Order*, at ¶¶ 410 (emphasis added), "If media differ in importance systematically across respondents (e.g. if television were most important to everyone, and everyone made only minor use of radio to acquire news and current affairs information), then it would be misleading to weight all responses equally."
[18] *FCC Ownership Rules Order*. at ¶¶ 410-411 (emphasis added)
[19] *Prometheus*, p. 69.
[20] Id., p. 70.

Antitrust merger policy is a useful starting point because it is the pre-eminent area of public policy analysis of market structure and merger impacts. However, while antitrust merger policy provides the analytic tool, the Communications Act and First Amendment jurisprudence set the ultimate goals for policy to set ownership limits on media because the media involve much more than merely commercial activities; they deeply affect the nature and quality of democratic discourse in our society.

What are the goals of antitrust analysis? The goal of the antitrust laws is to protect competition. In a merger review, the Department of Justice and Federal Trade Commission (DOJ/FTC) try to prevent the creation or exercise of **market power**, which "is the ability profitably to maintain prices above competitive levels for a significant period of time... Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service or innovation market power,"[21]

What are the goals of media policy? The goal of the Communications Act is much broader in both what it seeks to promote and prevent. The Supreme Court has repeatedly ruled that the Communications Act "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[22] In *Red Lion*, the seminal television case, the Court ruled that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount...the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences...[T]he 'public interest' in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public."[23]

[21] Department of Justice/Federal Trade Commission, *Merger Guidelines* (1997).
[22] *Associated Press v. United States*, 326 U.S. 1, 20 (1945).
[23] *Red Lion Broadcasting v. FCC*, 395 US 367, 390 (1969) (hereafter *Red Lion*).

Limits on media ownership are based on the premise that "diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints as well as by preventing undue concentration of economic power."[24] Moreover, "the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level."[25]

Thus, media ownership limits are concerned about promoting diversity of viewpoint, and preventing undue concentration of economic power and inordinate influence over public opinion. There are other goals of media policy, as well, such as localism, racial or gender diversity, but this analysis focuses on the concentration issue.

STANDARDS

What is a concentrated market? The Department of Justice and Federal Trade Commission analyze markets on the basis of the market share of the firms that sell products in the market. They use the Herfindahl-Hirschmann Index (HHI) to analyze markets on the basis of the market shares of firms.[26] When there are fewer than the equivalent of 10 equal sized competitors (an HHI of 1000), the market is considered concentrated. For the DOJ, mergers that increase concentration in these markets by as little as little as 10 percent (100 points) "raise significant competitive concerns." At this level of concentration, markets are considered oligopolies. Markets with the equivalent of 5.5-equal sized firms (HHI of 1800)

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[24] *FCC v. Nat'l Citizens Committee for Broadcasting*, 436 U.S. 775, 780 (1978); Prometheus *Radio Project, et al. v. FCC*, 373 F.3d 372, 383 (3rd Cir. 2004) (citing *Nat'l Citizens Committee for Broadcasting*, 436 U.S. at 780).

[25] *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 160 (D.C. Cir. 2002) (quoting FCC's 1999 Local Ownership Order, *Review of the Commission's Regulations Governing Television Broadcasting*, Report and Order, FCC 99-209 (rel. Aug. 6, 1999)).

[26] In plain English, the HHI is calculated by taking the percentage of the market that each firm has, squaring it and summing for all firms. See William G. Shepherd, *The Economics of Industrial Organization* (Englewood Cliffs, NJ: Prentice Hall, 1985), p. 389, for the formula.

are considered highly concentrated and mergers that increase concentration by as little as 3 percent (50 points) are deemed to be "likely to create or enhance market power."

Market structure is also frequently described in terms of the combined market share of the top four firms in the market.[27] When the top four firms have more than 40 percent of the market, the market is considered to be an oligopoly.[28] When the top four firms have more than 60 percent of the market, it is considered a tight oligopoly.

For the purpose of this analysis, we describe media markets in terms of the basic antitrust thresholds – whether they are concentrated or oligopolies and whether mergers would increase concentration in excess of the *Merger Guideline* standard. Of course, many believe that because media ownership affects democratic discourse so profoundly, the standard should be even higher. Moreover, there is no guarantee that competitive markets achieve the other goals of the Communications Act, such as localism, or ensuring minority ownership.

METHODOLOGY

MEASURING MARKET CONCENTRATION

The methodology will be fully described in our comments to be filed on October 23, 2006. Briefly, we follow the ruling in *Prometheus et al. v. FCC.*[29] The key points are that the analysis must focus on local news and information, measure the audience that the outlet attracts and reflect the importance that the public places on various media.

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[27] Id.
[28] Id., p. 4.
[29] Mark Cooper, "When Law and Social Science Go Hand in Glove," in Philip Napoli (Ed.), *Media Diversity and Localism: Meaning and Measurement* (Mahwah: Lauwrence Earlbasum, 2006

We use the Arbitron area as the geographic unit of analysis, which is what the FCC proposed and drew no criticism from the Court. We analyze local news and information measured as follows:

For daily newspapers, we count the circulation of all the daily newspapers sold in the area and calculate what percentage of the total each paper gets. We do the same for weeklies and calculate an average daily circulation. For TV, we look at the ratings of each TV station during the news day parts. For radio, we count only those stations that list news, information, public affairs or talk as one of their top three formats. Weights in this study are based on survey evidence about which media influence public opinion. Market shares for the purpose of estimating market concentration are then measured as follows:

WITHIN MEDIA = AUDIENCE
ACROSS MEDIA = AUDIENCE X WEIGHT.

ANALYZING MERGERS

To model the potential impact of the green-lighted mergers, we consider two scenarios. In the $1^{st} + 1^{st}$ **scenario, the largest firm merges with the largest available cross media firm**. The **2^{nd} largest unmerged firm does the same**. In the $1^{st} + 2^{nd}$ **scenario these mergers are flipped.** The largest firm is assumed to merge with the second largest cross media firm available, while the second largest firm mergers with the largest cross media firm available. In both cases, where the largest firm already owns a newspaper and a TV station, we assume it buys a second or third TV station. We assume mergers that additional cross-media mergers take place until all significant daily newspapers have merged with TV stations (papers with more than 5 percent of the total media market). We assume that the largest merger in each scenario takes place first and only the top two mergers are flipped in the second scenario. Under a "no questions asked" approach, there is nothing the agency could do to stop the merger wave. **We do not consider additional TV-TV mergers**, which also would have been allowed by the FCC's remanded rules and would concentrate markets even more.

Why do you analyze mergers that could happen? There are several reasons. First, **when a major change in ownership rules is proposed that could fundamentally alter market structure, it is irresponsible not to examine what could happen.**

Second, **the experience over the last decade with similar changes suggests substantial merger activity will take place.**[30] In less than a decade after the repeal of the Financial and Syndication Rules, the broadcasters went from owning about one-fifth of the shows in prime time to four-fifths. In less than a decade after the lifting of the national cap on radio, the top four firms went from owning about 160 stations to owning over 2,000. In less than a decade after the relaxation of the duopoly rule, over 75 duopolies were created.

Third, in looking at media outlets, **it is clear that many properties would be in play.** The TV stations that are not owned and operated by the major networks would certainly be targets. Properties owned by Tribune, Belo, Hearst, Media General and Fox would be in play, since all of the parent corporations are already in both the TV and the newspaper business. Only the network-owned and operated stations (O&O's) in the largest markets might be more difficult acquisition targets. However, with increased pressure from a wave of combinations, these stations too might find it hard to resist assimilation into a cross-owned enterprise.

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[30] These trends are analyzed in Mark Cooper, *Media Ownership and Democracy in the Digital Information Age* (Palo Alto, Stanford Law School Center for Internet and Society, 2003) Chapter VI.

Fourth, **many of the mergers could take place by swapping properties,** rather than with buyouts. This would diminish the amount of cash that would be needed to make the deals.

Finally, the issue of mergers and major structural changes in media markets that they could cause is a long-term concern. **The question is not which mergers will take place the week, month or year after the policy change, but how it will evolve over a period of years.**

In summary, **the possibility that a substantial amount of merger activity would take place is high. It is incumbent upon policymakers and the public to understand what could happen in these very important markets.**

RESULTS OF THE ANALYSIS

CURRENT STATUS

As shown in Exhibit 1, While the BIA database lists over 100 media outlets for the Los Angeles Arbitron area that plausibly provide news and information, over half of these do not have a measurable market share. Only 15 of these outlets have a market share above 5% within their medium. This was the standard the FCC used to count newspaper voices in the past. This observation shows how important it is to measure actual audiences in analyzing market structure, a point that was emphasized by the *Prometheus* Court

Exhibit 1: Current Status of Los Angeles Media Markets

	Total Outlets	Measurable Market Share	Greater than 5% within Medium	DOJ/FTC HHI	Market Share of top 4 firms
Dailies/Weeklies+	42	31	5	2827	88%*
TV++	47	10	6	1681	74%
Radio+++	13	6	4	2448	77%
Total	82	46	15	980	54%

*Two of the top 4 weekly publishers are also in the top 4 daily publishers.
+ Newspapers listed in Arbitron area
++ All TV stations in the Designated Market Area.
+++News, talk, full service, educational in one of top 3 formats

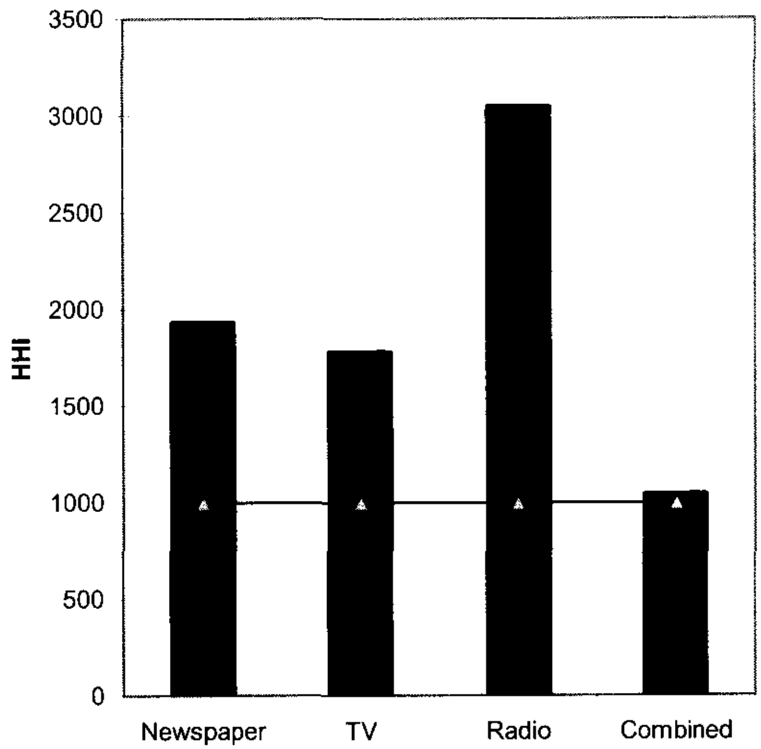
As shown in Exhibit 2, the HHI for newspapers and radio is well into the highly concentrated range. TV is concentrated. The overall market is just below the concentrated threshold. The largest four firms in each of the individual media have a market share of 75 percent to 90 percent, making them all tight oligopolies. When we combine all of the media outlets, we find that the overall market is an oligopoly, somewhat below the tight oligopoly threshold of 60 percent.

IMPACT OF MERGERS

Even in Los Angeles, the second largest market in the country and one of the least concentrated, any cross media merger involving the top newspaper and TV firms would increase concentration in excess of the DOJ/FTC *Merger Guidelines.* As shown in Exhibit 3, under both of the scenarios considered, Los Angeles would become a concentrated, tight oligopoly, with the HHI rising from just under 1000 to over 1700. Thus, an unconcentrated market would move close to being highly concentrated. The four firm concentration ratio would increase from about 54 percent to over 80 percent. A loose oligopoly would exceed the tight oligopoly threshold substantially.

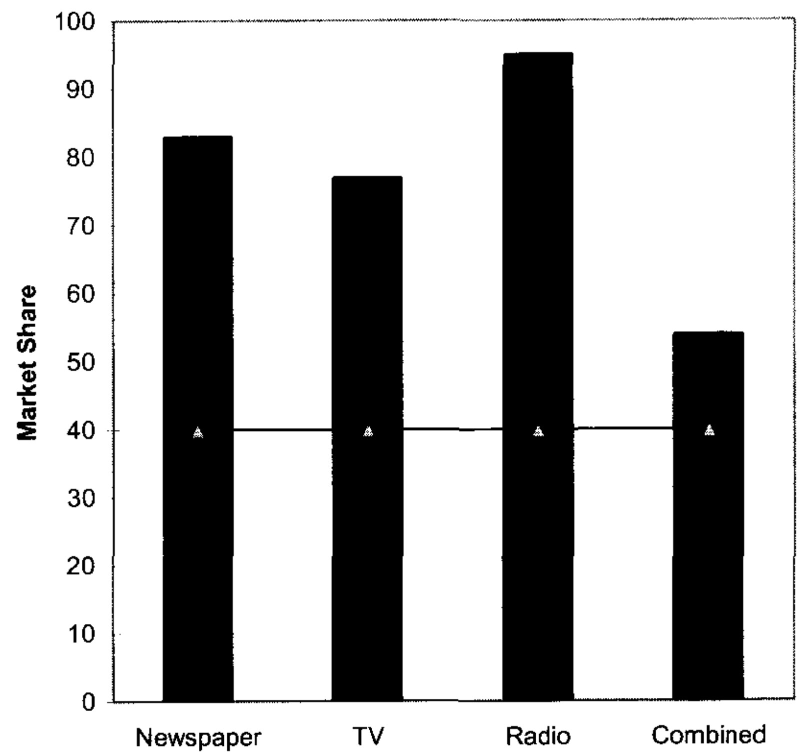
EXHIBIT 2: CURRENT MEDIA MARKET STRUCTURE

DOJ/FTC MERGER GUIDELINES HHI



△ = **Concentrated above 1,000**

FOUR FIRM CONCENTRATION RATIO



△ = **Oligopoly, above 40**

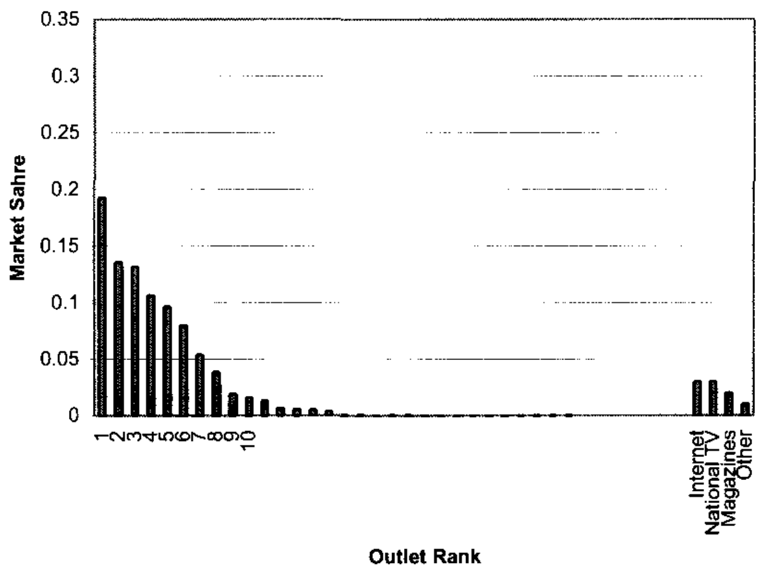
EXHIBIT 3: IMPACT OF NEWSPAPER/TV MERGERS

SUMMARY OF IMPACT

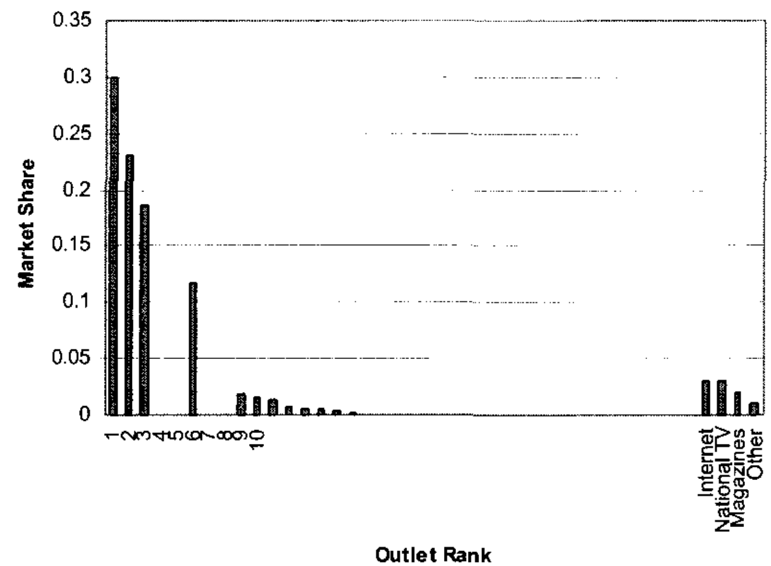
Scenario	Market HHI Before	Market HHI After	Post Merger Status	Merger Guidelines Threshold 1st Merger	Merger Guidelines Threshold 2nd Merger	Market Share CR4 Before	Market Share CR4 After	Market Share Top Firm Before	Market Share Top Firm After
1 + 1 Scenario:	980	1787	Concentrated	Violated	Violated	54%	80%	16%	26%
1 + 2 Scenario:	980	1756	Concentrated	Violated	Violated	54%	80%	16%	24%

MARKET SHARE OF LEADING FIRMS

CURRENT



AFTER MERGERS (1st +1st Scenario)



As shown in Exhibit 3, the change in the Los Angeles market that would result from a wave of newspaper-TV mergers is extremely troubling. In the current situation we find two leading entities (newspapers) and a number of other smaller competitors. Cross-media mergers would allow a small group of firms to dominate. The top three firms could increase their market share from just under half of the market to almost three quarters. If the dominant firms added more TV stations to their holdings, which would be allowed under the FCC approach, the situation would become even more dangerous.

CONCLUSION

This paper has shown that mergers between newspapers and TV stations in the same market pose a grave threat to democratic discourse.

- In antitrust terms, these mergers result in increases in market concentration that raise significant competitive concerns and are likely to create or enhance market power.
- In terms of the Communications Act and First Amendment jurisprudence, the newspaper-TV combinations that result dominate the local market, raising concerns about undue economic concentration and inordinate influence over public opinion.

The Commission must place the dire consequences of such mergers in the center of its thinking for a variety of reasons.

- Television and newspapers are the two most important sources of local news and information by far.
- The ban on such mergers was the longest standing of the rules that the Commission is considering.
- The Commission proposed the most radical change in this rule – allowing newspaper-TV combinations in virtually every city in America.
- In rejecting the Commission's cross-media limits, the Court devoted a great deal of attention to the Commission's faulty reasoning and flawed analysis of media markets.

- Historical evidence and logic suggest that many of the mergers analyzed in scenarios considered would take place.

The recently unearthed studies at the FCC also magnify the importance of considering increases in concentration and cross media mergers.[31] A series of detailed econometric studies utilizing a database that the FCC had misinterpreted in its Order shows the following.

- More concentrated markets provide less local news and less diversity in the news.
- Conglomeration reduces the amount of local news.

In short, cross media merges undermine the unique goals that the Commission is charged with achieving under the Communications Act that derive from the principle that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Congress has articulated these as an obligation to promote localism and diversity in the media and the Supreme Court has upheld this approach. After three reversals by the Court, it is time for the FCC to role up its sleeves and do the careful analysis that the Courts have demanded.

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[31] Anonymous, *Do Local Owners Deliver More Localism? Some Evidence from Local Broadcast News* (Federal Communication Commission, draft dated June 17, 2004); Alexander, Peter J. and Brendan M/Cunningham, "Diversity in Broadcast Television: An Empirical Study of Local News," *International Journal of Media Management* 6:177.